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IN THE

Supreme Court of the United States

October Term, 1971
No. .....
71-488

MICHAEL S. SIMMS,

Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

YUKIKO HARUTA SIMMS,

Real Party in Interest.

Petition for Writ of Certiorari to the Supreme Court of California.

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SUPERIOR COURT OF LOS ANGELES COUNTY,

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Real Party in Interest.

Petition for Writ of Certiorari to the Supreme Court of California.

To the Honorable Chief Justice Warren E. Burger and to the Honorable Associate Justices of the Supreme Court to the United States:

Petitioner respectfully prays a Writ of Certiorari be issued to review the denial of the Supreme Court of California of petitioner's Petition for hearing in the Supreme Court, on July 7, 1971, after the denial of petitioner's Petition for Writ of Review by the District Court of Appeal, on June 9, 1971.

Opinions Below.

There have been no opinions, either reported or unreported, other than the Minute Order of February 2, 1971, reproduced herein as Appendix E.

Jurisdiction.

Petitioner's Petition for hearing before the Supreme Court of California was denied on July 7, 1971 (Appendix G, *infra* p. 17). The jurisdiction of this Court is involved under 28 *U.S.C.* Section 1257(3).

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved, to wit: Section 1 of the Fourteenth Amendment of the United States Constitution, and California Code of Civil Procedure, Section 1218, are set forth in the Appendix A, page 1.

Questions Presented.

I.

Does the practice of determining the number of counts for which petitioner can be cited for contempt, based upon the number of times per month that spousal support and child support payments can be ordered, work an extreme hardship upon the less wealthy, constituting an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

II.

Does the complete absence of evidentiary support in the record to sustain the finding of petitioner's ability to pay spousal support and child support constitute a denial of due process in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

This Petition for Certiorari is based upon the Order to Show Cause re Contempt heard on January 29, 1971, and on February 2, 1971, before the Honorable

Hyman O. Danoff, Judge *Pro Tem.*, Department 19, Superior Court of the State of California, County of Los Angeles. The events which preceded and upon which these hearings revolved were as follows:

On or about June 25, 1968, *pendente lite,* Petitioner was ordered to pay the Real Party in Interest the sum of $200.00 per month per child and $350.00 per month spousal support. Petitioner was thus obligated to pay to the Real Party in Interest the sum of $750.00 per month, payable half on the 1st and half on the 15th of each month. A copy of said Order is attached hereto, marked Appendix C, and incorporated herein by this reference as though set forth at length.

On March 12, 1969, by Stipulation, the matter was set for trial on July 15, 1969. four months hence, and by Stipulation support payments due from Petitioner were increased from $750.00 to $1,000.00 per month [R.T. pp. 6-7],[1] for that four month period of time only and only until first day of trial.

On July 1, 1969, a Stipulation was entered into continuing the date of trial from July 15, 1969 to September 24, 1969. The Stipulation further provided that the Order of March 12, 1969, increasing the support payable by Petitioner from $750.00 a month to $1,000.00 a month, was extended to and including the 24th day of September, 1969, (the precise date set for the first day of trial in the event it was subsequently continued). Said sum was payable one half on the 1st and one half on the 15th day of each month, commencing July 15, 1969. A copy of said Stipulation and Order is attached hereto, marked Appendix D, and in-

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[1]R.T. refers herein to Reporter's Transcript on Appeal.

corporated herein by this reference as though set forth at length.

Trial commenced on January 12, 1970, and was heard on January 12, 13, 14, 20, 21 and 22, 1970. The Court granted an Interlocutory Judgment of Dissolution, made provisions as to custody of the children, and issued Restraining Orders.

On April 15, 1970, the Court made an Order that required that Petitioner pay $200.00 per month per child, pay all medical and dental expenses for the minor children which cost $75.00 or more per occurrence, provided that he be consulted in advance, and spousal support in the amount of $250.00 per month, for a period of 36 months, for a total of $650.00 per month.

When the Order to Show Cause re Contempt was heard January 29 and February 2, 1971, the Court found that there was a valid Order based upon the Stipulation of July 1969, and that the total support was $1,000.00 per month *until the date of trial.* The Court likewise found that the Order remained in effect until April 15, 1970, the date on which the Trial Court issued its Order, which, in effect, was a Memorandum of Decision which, among other things, reduced support to a total of $650.00 per month. The Court determined, in spite of the fact that it ruled in its Minute Order that the $1,000.00 per month Order was effective until date of trial, that the period during which Petitioner could be held in contempt was between September 1, 1969 and April 15, 1970. A copy of said Order is attached hereto, marked Appendix C, and incorporated herein by reference.

At this hearing, the issue before the Court was whether or not there was sufficient evidence of Petitioner's income and financial ability at the time of

each of the alleged dates of contempt. At the hearing, the only evidence before the Court, presented with respect to the ability to pay issue, was given by Ivan Levitan, Petitioner's accountant, called to testify by the Real Party in Interest. Through Mr. Levitan's testimony [R.T. pp. 20-55] and the introduction into evidence of a financial statement that he had prepared for Petitioner, it was demonstrated without any controverting evidence whatsoever, that Petitioner had available for his personal use during the period of time involved approximately $620.00 per month, and that during this same period of time he paid approximately $365.00 per month to the Real Party in Interest to satisfy whatever portion that he could of his support obligation, leaving a balance of only $255.00 per month for himself to pay all of his living expenses [R.T. pp. 71, 72].

Following the testimony of Mr. Levitan, the court made the following statement, which reflected the basis for Petitioner's being held in contempt:

> "THE COURT: Mr. Trope, the court heard the testimony. I don't like to make this type of statement, but I was not impressed by the financial statement. I was not impressed by the testimony of Mr. Levitan. If you were to quote the phrase, 'to make the punishment fit the crime', Mr. Levitan made the financial statement to fit what he wanted to present. It was very obvious from the questions the court asked him that he only knew what he wanted to know, and I was not impressed by the statement at all.
>
> The court feels, from what I have seen here, that the Respondent has sufficient assets to meet all of these orders if he wants to do so." [R.T. pp. 91-92].

This statement by the Court is reflective of the fact, however, that absolutely no evidence was presented. Certainly the Real Party in Interest presented no independent proof to indicate that Petitioner possessed greater assets than testified to by Mr. Levitan. The Court merely believed there were greater assets, the source or location of which there was no proof and of which he was totally unable to indicate.

Notwithstanding the fact that there was no evidence as to the ability of Petitioner to pay at the times charged, and that there is no evidence at the present time to reflect the fact of Petitioner's ability to make payments of $2,800.00 per month, Petitioner was ordered to pay $2,800.00 per month for three months and $1,000.00 per month thereafter, or to face a 60 day jail sentence in County Jail on 16 counts on contempt.

Therefore, it is Petitioner's contention that without any evidence of his ability to make payments of $1,000.00 on each of the contended dates of contempt, by engaging in speculation as to financial ability without any evidentiary support and by conditioning the contempt sentence on payments not reflecting present ability to pay, the Court acted in excess of jurisdiction.

Further, the Court, in finding Petitioner guilty of 16 counts of contempt rather than 8 counts of contempt, violated Petitioner's rights to equal protection under the laws under the Fourteenth Amendment.

Petitioner therefore urges that the Court exceeded its jurisdiction and that the imposition of either the fine or the jail sentence will result in irreparable injury and, therefore, respectfully submits that said order of contempt be annulled.

ARGUMENT.

A Petition for Writ of Review was timely taken to the District Court of Appeal of California, Second Appellate District, said court denying the Petition without hearing. The Petition was then timely presented to the Supreme Court of California, which court denied the Petition without hearing. This Petition is presented at this time by petitioner seeking a hearing in the Supreme Court of the United States. This Petition is presented in order to secure uniformity of decision and the settlement of important questions of law. In light of the recent decisions of *Williams v. Illinois*, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. (1970) and *In re Antazo*, 3 Cal. 3d 100 (1970), special and important reasons exist why this Honorable Court should review the contempt citation below.

I.

The Practice of Determining the Number of Counts for Which Petitioner Can Be Cited for Contempt, Based Upon the Number of Times Per Month That Spousal Support and Child Support Payments Were Ordered, Works an Extreme Hardship Upon the Less Wealthy, Constituting an Invidious Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

It is the practice of trial court judges in Los Angeles County, as well as elsewhere, to determine the frequency that a man will be required to pay spousal and child support, based upon his financial status [See arguments of counsel, R.T. pp. 87, 88]. The husband will be ordered to pay a certain sum per month for support, and the Court will direct the sum to be paid on certain dates, normally determined by the method

the husband is compensated by his employer. Thus, an individual earning a marginal income will be required to make payment once a week; a better situated individual twice a month; and the wealthy only once a month. This practice is not criticized as an improper method designed to assure payment to the wife while the money is available. It is recognized that an individual with a low income may be hard pressed to make payments at the end of the month and thus needs the discipline of weekly or bi-monthly payments to insure that the wife will be paid. Thus, sound reasons exist for requiring differing frequencies of payment, and the State has a substantial interest in recognizing these differences. However, it must be recognized that the order is for a certain amount per month, payable on certain dates, and not a certain amount on certain dates for a total of so many dollars per month. By way of clarification, the husband may be ordered to pay $500.00 per month support. The Court, upon determining that the husband is paid once a week, will order the $500.00 paid in installments once a week. When the husband is paid once a month, the Court will order the $500.00 paid once a month. In the instant case, the Court did not order $500.00 payable on the 1st and 15th of each month, for a total of $1,000.00 per month, but rather $1,000.00 per month, payable on the 1st and 15th days of each month. The order must be considered as a once-a-month obligation, and any breakdown of the payments in the instant case is for the convenience of payment and not the ordering of support on a bi-monthly basis. Any other interpretation would result in a violation of Petitioner's equal protection under the law.

Thus, when these different schedules for payment become the basis upon which an individual is held in contempt for non-payment, an invidious discrimination, solely upon the basis of wealth exists. This constitutes a violation of the Fourteenth Amendment to the United States Constitution, which provides that, "No State shall deny to any person within its jurisdiction the equal protection of the laws."

Here, Petitioner was found not to have made payments on 16 occasions. Having previously been ordered to make payments twice each month, he was found in contempt for not having made payments for eight months. Each occasion for which Petitioner was found not to have made full payment constituted one count of contempt. On the 16 counts, Petitioner was sentenced to serve 60 days in County Jail. Had Petitioner been a more wealthy individual and been ordered to make monthly payments for the same period, the maximum jail time to which he could have been sentenced would have been 40 days, pursuant to California Code of Civil Prodecure, §1218. If Petitioner had earned less money than he did, it is conceivable that he could have been sentenced to serve 160 days in jail. Therefore solely on the basis of earning capacity, an individual can be sentenced to serve 120 more days than a wealthier person in the same position and of equal fault. Here, solely by virtue of his earning capacity, Petitioner would be required to spend an additional one-third period of time, or more, in jail.

Two recent decisions, *Williams v. Illinois*, 26 L. Ed. 586, 90 S. Ct. ...., and *In re Antazo*, 3 Cal. 3d 100 (1970), have focused national attention on the questions of ordering imprisonment for the non-payment

of fines and increased imprisonment on the basis of wealth.

The landmark *Antazo* decision is of specific interest here. In *Antazo*, an indigent defendant was confined to county jail because he was unable to raise a fine which the court ordered him to pay as a condition of probation. The court held that absent any compelling state interest necessitating it, an order that defendant be jailed for default of a fine constitutes an invidious discrimination on the basis of wealth, in violation of the equal protection clause of the Fourteenth Amendment.

The court began its analysis on the basis that while imprisonment for non-payment of fines has been a long-established tradition, such longevity "does not foreclose its reassessment in the light of the continued evolution of fundamental precepts of our constitutional system, for neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. An abiding concern for equality in all areas of today's society has not spared established practices from exposure under the spotlight of equal protection principles."

In re Antazo, 3 Cal. 3d 100 (1970);
Williams v. Illinois, supra.

Secondly, the court went on to note that the nature of the penalty actually inflicted depends upon the defendant's financial ability (at p. 190). This, specifically, is the effect of the frequency of payments disparity in the present case.

In its analysis of the Fourteenth Amendment, the court stated that based upon the fundamental prin-

ciple of *Griffin v. Illinois,* 351 U.S. 12, 100 L. Ed. 891 (1956), justice must be administered to all persons equally. As stated in *Purdy and Fitzpatrick v. State of California,* the:

> "concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."

The court next went on to discuss the relationship the statute (here practice) must bear to some legitimate State end. Where the nature of the case involves "suspect classifications" or touching on "fundamental interests", the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny.

> 3 Cal. 3d at p. 111, citing *Shapiro v. Thompson,* 394 U.S. 618, 638, and other cases.

Therefore, under the application of this strict standard, the State "bears the burden of establishing not only that it has a compelling interest which justifies the law, but that the distinctions drawn by the law are necessary to further its purpose."

> 3 Cal. 3d at p. 111, citing *Castro v. State of California,* 2 Cal. 3d 223, 234-236 (1970).

Therefore, relative to the present case, *Antazo* stands for the proposition that, absent a compelling State interest, the State cannot condition the amount of time an individual can be jailed solely on the basis of wealth. Assuming, *arguendo,* that Petitioner was in contempt for the period specified, the Fourteenth Amendment requires that he be sentenced consistent with individuals possessing both greater and lesser wealth. In

this way, the purpose of the State, that disregard of its lawful orders shall not go unpunished, and the constitutional imperative of equal protection are satisfied. Thus, all orders for the payment of spousal and child support must be treated as monthly orders, broken into segments to insure payment, if necessary, the violation of which constitutes one count of contempt per month.

II.

The Evidence Before the Trial Court Was Insufficient to Sustain Its Jurisdiction Constituting a Denial of Due Process Under the Fourteenth Amendment to the United States Constitution.

The only evidence upon which the court made the determination that Petitioner had the ability to pay $1,000.00 per month for support was that the court did not believe the testimony of Petitioner's accountant. Such disbelief on the part of the court in the face of no countervailing evidence to support the contention of Petitioner's ability to pay the $1,000.00 per month constituted a gross abuse of authority for which no contempt order could be imposed.

Where no evidence, or insufficient evidence, is introduced on an issue, the finding on that issue should be against the party who has the burden of proof. A finding in his favor cannot stand.

Walbergh v. Moudy, 164 Cal. App. 2d 768 (1958);

Sullivan v. Kantel, 164 Cal. App. 2d 723 (1954).

When the record fails to show that the court has jurisdiction or when it affirmatively appears that it lacked jurisdiction of the party or proceedings, upon

certiorari the order adjudging an accused person to be guilty of contempt should be annulled.

Mattos v. Superior Court, 30 Cal. App. 2d 641 (1939).

The following language from *In re Cardella,* 47 Cal. App. 2d 329 (1941), represents the attitude of the courts toward the care which the court must exercise with respect to a contempt proceeding to assure that an individual's due process rights are not violated:

> "Since proceedings in contempt are in their nature criminal in character, and the court exercises but a special and limited jurisdiction in such matters, *the record of the court upon which the party is adjudged guilty of contempt should show affirmatively upon its face the facts upon which the judicial action is based and upon which jurisdiction depended,* the purpose of the requirement being to enable the appellate court to determine by an inspection of the record whether a contempt has in fact been committed. No presumptions and intendments will be indulged in favor of an order; and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused." (Emphasis added).
>
> 47 Cal. App. 2d at p. 330.

Here the record is bare as to the facts upon which the court determined that Petitioner had the present ability to make support payments. The bare assertion of the court that Petitioner had the ability to make the payments, and that he wilfully and intentionally either made none of the payments or made payments in the amounts lesser than the amounts ordered while he had the ability to do so [R.T. pp. 84-85, February

2, 1971] without stating any reasons other than that he disbelieved the accountant is wholly inadequate proof to deprive an individual of his liberty or property.

In like respect see:

Gottlieb v. Superior Court, 168 Cal. App. 2d 309 (1959);

In re Shackelford, 116 Cal. App. 2d 864 (1953).

Furthermore, the order of the court of February 2, 1970, is internally inconsistent. The court recognized the order of the trial court, that the $1,000.00 per month payments were to continue only until the date of trial. Trial commenced on January 12, 1970, and ended on January 26, 1970. Despite this fact, the court found Petitioner to be in contempt through April 15, 1970, nearly three months later. Furthermore, despite the fact that the court recognized that the $1,000.00 per month order expired at the date of the trial, the court, in this hearing, ordered Petitioner to comply with its order and to pay $1,000.00 per month for support, an order identical with the expired order of $1,000.00 per month support, as a condition of staying execution of the jail sentence.

Clearly, ambiguities existed, in that the court failed to properly understand the orders in existence, and there was, in fact, no order of support in existence. How, we must ask, can the Petitioner understand his liabilities and responsibilities, and be subject to contempt, if the court misconstrues the fact that the prior order ceased on the day trial commenced, on January 12, 1970. To be an enforceable order, enforceable by

contempt, the order must be so clear as not to have any ambiguities whatsoever.

In re Blaze, 271 Cal. App. 2d 210 (1969);

Butler v. Superior Court, 178 Cal. App. 2d 763 (1960).

Disobedience of an order of court is not contempt where it is due to the inability of the accused to comply with the order and where such inabiiity is not due to voluntary and fraudulent conduct on the part of the person adjudged in contempt. Accordingly, it is an essential ingredient of an adjudication of contempt that it appear in the commitment that the party found guilty had the ability to perform.

In re Cardella, supra, at p. 330.

A support award must be based both on the wife's needs and the husband's ability to pay. An award which does not take account of the financial ability of the husband is improper.

Loeb v. Loeb, 84 Cal. App. 2d 141, 146 (1948).

The only "evidence" upon which the trial judge found Petitioner's ability to make support payments and upon which the contempt order is based was his disbelief of the testimony of Petitioner's accountant. It is axiomatic that the judge may not arbitrarily reject evidence, or consider facts that were not presented at the trial.

Man Wo Chan Estate, 87 Cal. 155.

In *Brautigan v. Brooks*, 227 Cal. App. 2d 547 (1964), the court discussed the degree of proof required to sustain a claim of a party and of the weight and sufficiency to be given to the evidence presented.

The court stated that an inference cannot be based upon mere possibility and cannot flow from the non-existence of a fact; it can be drawn only from a fact actually established. (C.C.P. §§1958, 1960).

An inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work. 227 Cal. App. 2d at p. 556. Where the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary.

Therefore, a contempt proceeding based upon a finding of the husband's ability to pay $1,000.00 per month for support, where there is no substantial evidence in support of such finding, is void and as such should be annulled.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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Of Counsel.

APPENDIX A.

Constitutional and Statutory Provisions Involved.

1. The Fourteenth Amendment of the Constitution provides: Section 1, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 1218 of the Code of Civil Procedure of California, provides:

"Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding Five Hundred Dollars ($500.00), or he may be imprisoned not exceeding five days, or both, . . . the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket."

APPENDIX B.

Portion of Record Setting Forth Timely Raising of Federal Question That Petitioner Has Been Deprived of Equal Protection and Due Process Under the Fourteenth Amendment to the Constitution.

I EQUAL PROTECTION

Reporter's Transcript on Appeal, January 29, 1971; February 2, 1971.

Rep. Tr., page 87, lines 2 through 8:

Mr. Trope: "I feel that though I don't know what the Court disposition would be in terms of the length of the sentence, the 60 day sentence based on what I am about to state, but I do feel that the Defendant's constitutional rights are being violated in that from an economic point of view, he is being deprived of due process insofar as being found in contempt of Court on 16 counts and I will state my basis therefore."

Rep. Tr. page 87, lines 21 through 28, page 88, lines through 28, page 89, lines 1 through 3:

Mr. Trope: "Now, I will state that which I am relating to.

There are basically three types of orders that this Court makes insofar as support. There are those monthly orders, those semi-monthly orders and there are those weekly orders and these orders are predicated for the most part upon the economic status of the individual. The labor or the working man who has the factory job who makes, gets paid weekly is generally ordered to pay $57.50 on Friday of each week or some such order, the first four Fridays. The individual who may be in business in a better economic status is ordered to pay a certain sum monthly and it is made in

two, the first and 15th. In the very well-heeled upper echelon, he is ordered to make the payments of support —this is catagorized. He is ordered to pay so much dollars a month on the first day of each month. If Mr. Simms was unfortunate enough to be one of his employees, payable on a weekly basis instead of winding up with 16 counts of contempt, he would have wound up with 32 days of contempt. On the other hand, if he was in a more affluent condition, he would have wound up with 8. I state that the Courts' orders are really monthly orders. It is really a fiction when we talk about the payment on the first and the payment on the fifteenth. That is simply a bookkeeping classification for the convenience and ease to the party to whom the order is directed and it is not in truth or in fact a computation of the order. The order is, for all intents and purposes, a monthly order and if we will examine the order, we will see that the order was a $1,000 a month. That's what the order was then. It talks about he is ordered to pay it half on the 1st and half on the 15th and I think it is a violation of his due process or any individual's due process, who may be ordered to pay in more modest installments, because of his economic level in society. It is a prejudice to that individual who has sufficient amount of money with which to pay any particular sum of money on the first day of each month and theoretically, you could go to all types of extremes in this regard and for that reason, if the Court feels that Mr. Simms is in contempt, which he obviously does, I would say that he is in contempt of Court of eight counts and not on 16 counts and I think it will be critical during the course of this situation."

II DUE PROCESS

Rep. Tr. page 71, lines 16 through 28, page 72, lines 1 through 28, page 73, lines 1 through 28, page 74, lines 1 through 28, page 75, lines 1 through 4:

Mr. Trope: "Then he hasn't made the order. But there is one part of the order that he did rule on from the bench and I am sure Mr. Picone would be willing to stipulate and that is that Mr. Simms was not given credit as to that September 8, 1969 order for an additional $326 accounting for the total $3600. That was specifically raised in my objections to findings and the Court specifically did rule on the fact that Mr. Simms was entitled to another $325, approximately, in credit.

Now, using those figures, I would like to call the following to the Court's attention by way of an accounting of this total matter. If we take the $2600 which Mr. Simms actually, in direct payments, paid by way of stipulation and we add to it the $325 which the Court actually concedes and acknowledges that Mr. Simms is entitled to for credit during that time, we had a total that he should be entitled to credit for, for that eight-month period of time, of $2,925. That amounts to a payment to Mrs. Simms of $325 a month for that eight-month period of time that we are talking about.

Now, let's look at Mr. Simms' income. The only testimony pertaining to Mr. Simms' income is the testimony by Mr. Levitan and it reflected, for an eight-month period, though we don't have the same eight months, but it does cover four of the months that we are concerned about, from January 1, 1970, through August 31, 1970, for that eight-month period, a net cash available, he called it for personal use, of $3,221. However, included in amounts for other cash paid out.

he has listed child support, $1,770. So, we have to add those two together to know what he actually had as a net income during that period of time and if you add those two figures together, the evidence showed that during that eight-month period of time of which four of the months that we are talking about and that's the best we can show, because we did have this overlapping problem until we got to Court to know what dates the Court considered critical of $620 that Mr. Simms had as income.

Now, we have added back the child support, back to what he showed as a net, which we must, in order to deduct now, therefore what was paid and we have available to him during this critical period of time, $620 a month for personal use and we have got evidence of the fact that he paid out, during the same critical period of time, $365 a month to his wife, regardless of whether for child support or not.

If you deduct the $365 from the $620, that leaves Mr. Simms remaining, during his own personal time, $255 for his own living purposes. I think the Court has to take judicial notice of the fact that Mr. Simms has to eat. He has to have clothing on his body. There are just certain things that one must have in order to even subsist or exist in this world and certainly $255 left remaining on a monthly basis is no great future. It certainly is not proper to say that a man should be put in a position of contempt or an attitude of contempt or found in contempt. Now, the figures don't lie. These are the only figures that have been introduced before this Court and they do clearly show a total $620 a month available for living expenses and $365 out to Mrs. Simms and I say, with that type of performance,

it is inconceivable to me that we could consider that Mr. Simms is in contempt during that particular period of time.

Now, as to these records that have been introduced that show bank statements to Midtown Plumbers, I think the Court recognizes, first of all, that those statements are from January 30, 1970 through the end of October, 1970, and we are only concerned with the first actually three months of that period because it starts with February to April and I think the Court can likewise recognize that even from Mr. Simms' statement, that Mr. Levitan testified to, that he had sales during periods of time, $7,718.30. When he talks about sales, that much service that he's performed and collected, you can't look at what a man's business actually flows in terms of gross sales or gross revenues as having money or cash available. That would be absolutely ridiculous. There are businesses which operate to a one percentile of profit margin in terms of total sales or total revenues produced and to look at the total revenues and to say, "therefore, you have earned a profit," or "you have got money available," is ridiculous. It's from an accounting point of view and it's ridiculous from a legal point of view to simply show the bank statements of Midtown Plumbers, which actually shows the flowing in of revenues from the sale that comes from the business. That doesn't show anything. As a matter of fact, I state to the Court that a business could have sales of $100,000 a year and be losing $20,000 a year to such a point that it can only lose, for some reason, and the business fails and it still might generate sales and the generation of sales and that flow of profit simply, by showing the bank statements of Midtown Plumbers, shows us absolutely nothing.

Now, the fact that in late 1970, in September and October of 1970, that Mr. Simms made deposits in a savings account, are first of all, it's not material to the issues at hand because we are concerned about that which took place between September, '69, and April, 1970, and which, as your Honor well knows from the file, it was a very critical period of time and it theoretically could be explained by saving for taxes or accumulating or the other thing. And it is not necessarily reflective of cash and it certainly cannot be reflective of cash available during the critical period of time, because of its many months thereafter.

And based on those reasons that have been presented, the evidence of the income, the evidence of the payments, I contend to the Court that Mr. Simms should not be found in contempt for the counts that the Court is considering at this time."

Rep. Tr., page 89, lines 4 through 13:

Mr. Trope: "Now, I don't know that with regard to the Court's terms and conditions of the stay, though this may not be the proper time to raise this particular point. I contend to the Court that there is absolutely no conceivable evidence of the human ability of this individual to pay $2,800 a month at this particular time. It is absolutely beyond the scope of any evidence that has ever been presented in this particular case, that this man would have the ability to pay $2,800 in support, in any given month, and that is precisely what the Court has in effect ordered."

Rep. Tr., page 90, lines 18 through 28, page 92, line 1:

The Court: "Mr. Trope, the Court heard the testimony. I don't like to make this type of statement, but

I was not impressed by the financial statement. I was not impressed by the testimony of Mr. Levitan. If you were to quote the phrase, "to make the punishment fit the crime", Mr. Levitan made the financial statement to fit what he wanted to present. It was very obvious from the questions the Court asked him that he only knew what he wanted to know and I was not impressed by the statement at all.

The Court feels, from what I have seen here, that the Respondent has sufficient assets to meet all of these orders if he wants to do so."

APPENDIX C.

Superior Court of the State of California, for the County of Los Angeles.

Date: June 25, 1968.

Honorable Robert A. Wenke, Judge.

Charles M. House, Deputy Sheriff.

Manuel J. Quesada, Deputy Clerk.

Marlene Marsh, Reporter.

Yukiko Haruta Simms vs. Michael S. Simms, et al. D727165.

Counsel for Plaintiff, Robert B. Smith.

Counsel for Defendant, Carl J. Mooslin, esq.

NATURE OF PROCEEDINGS:

Plaintiff's OSC re attorney fees, costs, alimony, child support, custody, and restraining orders.

Matter, transferred from department 8, is called for hearing. Pursuant to stipulation both parties are restrained from annoying, harassing or molesting the other party and from disposing of, encumbering or hypothicating any of the community property except in the ordinary course of business or for the necessities of life. Plaintiff is sworn and testifies in her own behalf.

Defendant is sworn and testifies in his own behalf.

Custody of the infants Ethel, born August 26, 1963; and Helene, born January 9, 1965 is awarded to plaintiff pendente lite.

Pursuant to stipulation the declarations are received into evidence subject to the right to cross examination and the right to offer additional evidence. Defendant resumes the stand and testifies in his own behalf. De-

fendant is ordered to pay the plaintiff, as and for child support, $200.00 per month per child, a total of $400.00 per month support for children, together with $350.00 alimony per month which defendant is ordered to pay to the plaintiff, a total child support payment and alimony of $750.00 per month, payable one half on the 1st day and one half on the 15th day of every month commencing July 1st, 1968 and continuing until further order of court. Defendant is ordered to pay to counsel for the plaintiff, attorney fees as follows: $1,000.00 forthwith; $500.00 on July 15, 1968; $500.00 on August 15, 1968; and $300.00 on September 15, 1968 with the provision that Attorney R. Smith is continuing service to the plaintiff as counsel of record on the dates that payment, as herein set, fall due. Defendant is allowed visitation with the children on alternate weekends from (9:00 AM Saturdays through 6:00 PM Sundays and on alternate Mondays from 4:00 PM through 8:00 PM, provided it does not interfere with school. Weekend visitation to commence on June 29, 1968 and Monday visitation on July 8, 1968. The court declares it is not necessary for the defendant to enter the home of the plaintiff when picking up the children. Defendant is ordered to vacate the family home by this night; the plaintiff is to remove from the family home no later than Saturday June 29, 1968. Both parties are restrained from using or making derogatory remarks about each other in the presence of the children or each other. Lillyien Sims, present, is restrained from disposing of, encumber-or hypothicating of any of the community property of the parties.

APPENDIX D.

Stipulation for Continuance and Extension of Support Order and Order.

Superior Court of the State of California, for the County of Los Angeles.

Yukiko Haruta Simms, Plaintiff and Cross-Defendant, vs. Michael S. Simms, Defendant and Cross-Complaint. No. D 727 165.

IT IS HEREBY STIPULATED by and between plaintiff, YUKIKO HARUTA SIMMS, and defendant, MICHAEL S. SIMMS, through their respective counsel as follows:

1. That the trial of this action presently scheduled for July 15, 1969 at 8:30 in Department 2 of the above-entitled court be continued to September 24, 1969, commencing at the hour of 8:30 A.M. in Department 2 of said court.

2. That the order heretofore made on March 12, 1969 for the support of the plaintiff and the minor children of the parties in the sum of $1,000.00 per month shall be extended to and including September 24, 1969, or any continued date thereafter payable as heretofore ordered, namely, one-half on the 1st and one-half on the 15th day of each month, commencing with July 15, 1969.

3. Further notice of trial is waived.

Dated: July ....., 1969.

LAW OFFICES OF
SAMUEL B. PICONE
By /s/ Samuel B. Picone
Attorney for Plaintiff

TROPE AND TROPE
By .....
Attorney for Defendant

ORDER

IT IS SO ORDERED.

Dated: July ....., 1969.

.....

Judge of the Superior Court

APPENDIX E.

Superior Court of the State of California, for the County of Los Angeles.

Date: Feb. 2, 1971.

Honorable Wm. P. Hogoboom, Judge.

Honorable Hyman O. Danoff, Judge Pro Tem.

T. Lipka, Deputy Sheriff.

E. Wallin, Deputy Clerk.

M. C. Quattrocchi, Clerk.

Jerry Levine, Reporter.

Simms, Yukiko Haruta, Petitioner and Simms, Michael S., Respondent D 727165.

Counsel for Petitioner Samuel B. Picone.

Counsel for Respondent Sorrell Trope & Trope By: Sorrell Trope.

NATURE OF PROCEEDINGS.

Cause continued from January 29, 1971, in this Department again resumes hearing.

The matter is argued.

The Court finds that on March 12, 1969, after hearing, the Court made an order which was thereafter reduced to writing and signed and filed as a written order on September 19, 1969, which order provided that the respondent pay $1,000 per month for the support of the petitioner and the two minor children of the parties payable $500 on the 1st and 15th of each month commencing March 15, 1969, and continuing for a period of 4 months only. Thereafter, to wit: on July 2, 1969, pursuant to stipulation of the parties an order was made which in effect provided that the said payments were to continue until the date of trial.

The Court finds that the said orders were valid orders and that the respondent had knowledge thereof.

From the testimony presented to the Court, the Court finds that on each and every 1st and 15th day of the month commencing September 1, 1969, through April 15, 1970, the respondent did not make a payment of $500. On some of the said dates no payment was made and on other dates sums of $250, $200, or $100 were made.

The Court finds that the respondent had the ability to make the payments of $500 on the 1st and 15th of each of said months commencing Sept. 1, 1969, through April 15, 1970, and that he wilfully and intentionally either made none of the payments or made payments in the amounts lesser than the amounts ordered while he had the ability to do so.

The Court finds that on the 1st and 15th of each month commencing September 1, 1969, through April 15, 1970, a total of 16 days, the respondent failed to make such payments in the amount of $500 per payment and the Court finds respondent guilty of contempt on each of the said dates, being: September 1, 1969, September 15, 1969, October 1, 1969, October 15, 1969, November 1, 1969, November 15, 1969, December 1, 1969, December 15, 1969, January 1, 1970, January 15, 1970, February 1, 1970, February 15, 1970, March 1, 1970, March 15, 1970, April 1, 1970 and April 15, 1970.

Respondent is sentenced to serve a total of 60 days on all of the said 16 counts in the County Jail.

Execution of the sentence is stayed on the following conditions: 1) The only valid order in existence this case concerning the payment of child support and

spousal support is the sum of $1,000 as previously ordered. Respondent is ordered to comply with the existing Court order. The payments shall be made payable at the rate of $500 forthwith and, thereafter, $500 on the 1st and 15th of each month commencing Feb. 15, 1971. 2) Respondent shall pay the petitioner the arrearage as stipulated to by the parties and their counsel which for the purposes of this particular hearing is $5,400. Said arrearage shall be payable as follows: $1,800 on or before February 15, 1971; $1,800 on or before March 15, 1971; and $1,800 on or before April 15, 1971;. Said payments shall be made to petitioner through the office of her counsel, Samuel Picone.

In the event the respondent fails to make any child support payments or any of the payments of $1,800, this matter may be brought before this Court for imposition of sentence.

APPENDIX F.

Los Angeles, June 9, 1971

TITLE:

Simms vs. Superior Court, L.A. Co. No. 38386.

The Court: Petition for writ of review denied.

Prior to hearing procedure for next step, if any. Procedure—to directly to U.S.

Clay Robbins, *Clerk*

APPENDIX G.

Clerk's Office Supreme Court
4250 State Building
San Francisco, California 94102
July 7, 1971

Dear Sir: *I have this day filed Order* Writ other than cert. in S. Ct. Hearing Denied.

In re: 2 Civil No. 38356 Simms vs. Superior Court.

Respectfully,

G. E. Bishel

Clerk